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Supreme Court of the United States

October Term, 1973

No. 72-1597

ULYSSES VERNON BEASLEY,
EMIDIO J. BASSETTI AND
JOE W. JONES,

Petitioners,

v.

FOOD FAIR OF NORTH CAROLINA, INC.
AND RAY F. MESSICK

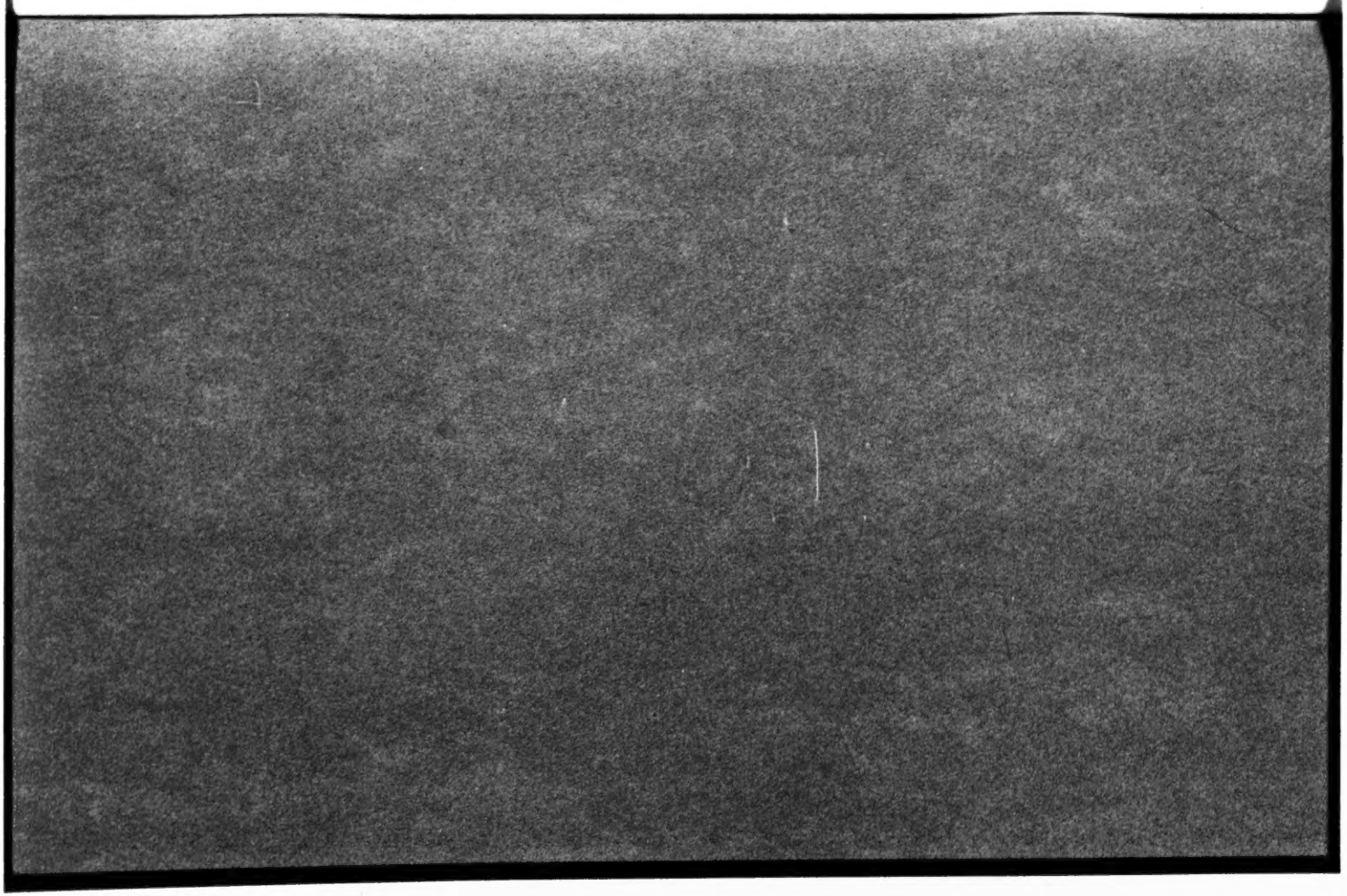
On Writ of Certiorari to The Supreme Court of The State of North Carolina

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BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals of the State of North Carolina is reported at 15 N.C. App. 323, 190 S.E. 2d 333 (1972), which reversed summary judgment for defendants entered by the Honorable Judge Robert M. Gambill, at

the 28 February, 1972, session of the Forsyth County Superior Court. The opinion of the Court is reprinted in the "Single Appendix" beginning at page 13. The opinion of the Supreme Court of the State of North Carolina is reported in 282 N.C. 530, 193 S.E. 2d 911 and reprinted in the "Petition for a Writ of Certiorari" begin- at page A.1.

JURISDICTION

The judgments and opinion of the Supreme Court of the State of North Carolina were made and entered on January 26, 1973. (193 S.E. 2d 911). The petition for a writ of certiorari was filed on May 29, 1973, an extension of time to file the same having been granted by the Honorable Judge Warren E. Burger April 26, 1973 (Petition p. A. 31). Certiorari was granted October 15, 1973. The jurisdiction of this Court rests upon 28 U.S.C. 1257 (3).

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent portions of the North Carolina Right-To-Work Law, chapter 328, Session Laws of 1947, codified as North Carolina General Statutes 95, Sections 78 through 84, are set forth in the Appendix at pages 16-18.

In addition, Section 14(a) of the National Labor Relations Act, codified as 29 U.S.C. Section 164(a) is set forth in the Appendix at page 19.

QUESTIONS PRESENTED

Whether there is any federal law which pre-empts a state from enacting a statute prohibiting an employer from discharging a person, *i.e.*, a supervisor, for membership in a labor union, organization, or association.

STATEMENT

The Petitioners, ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI, and JOE W. JONES, were, until June 26, 1971, employed by the defendant, FOOD FAIR OF NORTH CAROLINA, INC. On the above-mentioned date, two days after Local Union No. 525 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as the Union), won a majority in a National Labor Relations Board election, they were discharged. The Petitioners, through counsel, have steadfastly averred that the said discharges were unlawful in that the Petitioners were discharged solely due to their membership in the aforesaid Union.

The Union began an organizing campaign at defendant's Winston-Salem, North Carolina stores in the Spring of 1971. In the course of that organizing campaign, the three Petitioners named herein signed membership applications to join the Union and were accepted into membership in April and May of 1971. There is no evidence that they actively engaged in any pro-union activity.

On May 18, 1971, the local Union petitioned the National Labor Relations Board for an election among "all meat department employees at the Employer's stores in Forsyth County, North Carolina, but excluding stores managers, assistant store managers, grocery employees, produce employees, warehousemen, cashiers, office clerical

employees, guards, and supervisors as defined in the Act:" (Case No. 11-RC-3330). The Board granted the petition and ordered the election to be held on June 24, 1971. The three plaintiffs herein were excluded from participating in the election since they were determined by the Board to be supervisors. (A. p. 9) Directly after the election, they were discharged by defendant Messick, President of Food Fair Stores of North Carolina, Inc.

In June of 1971, the Union brought charges before the National Labor Relations Board alleging, *inter alia*, the discharge of the Petitioners herein to be violations of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended 29 U.S.C. 141 *et seq.*. (Case No. 11-CA-4622). It was the considered opinion of the General Counsel of the National Labor Relations Board that the plaintiffs were supervisors within the meaning of Section 2(11) of the National Labor Relations Act and hence not entitled to the protection of the Act. (See letter dated December 30, 1971 - A. p. 13).

Immediately following the Board's decision that the three Petitioners herein were not protected by Federal law, the complaint in the case at bar was filed. It alleges basically a violation of the North Carolina Right-To-Work Law, General Statutues 95-78, 95-81 and 95-83 (See Appendix pp. 16-17).

The defendant's Motion To Dismiss, Motion For Judgment on the Pleadings, and Plea in Abatement were heard by Judge Robert M. Gambill on February 21, 1972, (A. p. 4). Among other averments, the defendants asserted that the National Labor Relations Board had exclusive jurisdiction over the subject matter of this action and that as supervisors the Petitioners were therefore not protected by

the provisions of North Carolina General Statute 95-78 *et seq.*. Judge Gambill ruled, by Order dated February 28, 1972, that the Petitioners had failed to state a claim upon which relief could be granted and further that there was no genuine issue as to any material fact and that the defendants were entitled to judgment of dismissal as a matter of law. (A. p. 13).

The Petitioners appealed, excepting and assigning as error the ruling that the Petitioners were not protected by the North Carolina Right-To-Work Law, General Statutes 95-78 *et seq.*. (See Appendix, p. 16-17). The appeal was heard by the Court of Appeals of the State of North Carolina during the Spring Term of 1972, and the full panel of judges reversed the decision of the lower Court on August 2, 1972. (190 S.E.2d 333). The Court of Appeals, interpreting the decision of the United States Supreme Court in *Hanna Mining v. Marine Engineers,* 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965) as it relates to the decision in *San Diego Unions v. Garmon,* 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773, held:

> "That a state does have jurisdiction over activities of supervisors because the activities of supervisors could not be arguably either prohibited or protected under the Act (National Labor Relations Act), we reach the conclusion that in the case before us where, as in *Hanna,* the union members involved have been classified by the National Labor Relations Board as supervisors, the State Court has jurisdiction."

This view expressed by the North Carolina Court of Appeals was espoused by the Petitioners in their initial brief before that Court:

> "Counsel must, in order to fully protect its position, establish: . . . (2) That the matter is not covered or pre-empted by Federal law, and is therefore subject to State law . . ."

Immediately upon rendition of the North Carolina Court of Appeals decision the defendants petitioned the Supreme Court of North Carolina for Certiorari, and it was granted on August 15, 1972. The defendants challenged the North Carolina Court of Appeals' interpretation of Federal law and in particular its interpretation of the *Garmon Doctrine* and the *Hanna Mining Case*.

On January 23, 1973, the North Carolina Supreme Court rendered its decision reversing the North Carolina Court of Appeals. Stating in conclusion:

> "When, as in the present case, the facts disclose that plaintiffs as supervisors seek to invoke a remedy precluded by the established national policy, the doctrine of federal pre-emption applies, and the State Court is without jurisdiction over the subject matter of the controversy."

The Petitioners submit that the provisions of the North Carolina Right-To-Work Law provide them a remedy which is not precluded by any established national policy. Notwithstanding the pre-eminance of Federal law in the arena of Labor relations. The State Court does have jurisdiction over the subject matter of this controversy.

ARGUMENT

I. FEDERAL LAW DOES NOT PRE-EMPT STATES FROM REGULATING UNION MEMBERSHIP OF SUPERVISORS.

The 1947 Taft-Hartley amendments to the National Labor Relations Act (Labor Management Relations Act of 1947, 29 U.S.C. Sections 151, *et seq.*) and hereinafter referred to as the Act and in particular Section 164(a) and (b) bear significant weight when considering the points at issue:

> "29 U.S.C. Section 164(a) - Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act [Sections 151-158, 159-168 of this title] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either National or Local, relating to collective-bargaining.
>
> (b) - Nothing in this Act [Sections 151-158, 159-168 of this title] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

Prior to these amendments, the National Labor Relations Act specifically protected the right of all persons regardless of employment status to join or assist labor organizations. *Packard Motor Co. v. National Labor Relations Board*, 330 U.S. 485, 67 S.Ct. 789, 19 L.R.R.M. 2397 (1947). It is now well apparent that the Taft-Hartley

amendments exclude supervisors from the protection of the Act. *National Labor Relations Board v. Big Three Welding Co.*, 359 F.2d 77 (5th Cir. 1966). *National Labor Relations Board v. Charley Toppino and Sons, Inc.*, 332 F. 2d 85 (5th Cir., 1964). In *Oil City Brass Works v. National Labor Relations Board*, 357 F.2d 466, 61 L.R.R.M. 2318 (5th Cir., 1966), the same Court said:

> "If Hammock was fired solely because of his union affiliation, there has been no unfair labor practice on which the Board can predicate its Order. The National Labor Relations Act does not protect supervisory personnel. [citations omitted]. It is settled that the Act does not preclude a company from firing or refusing to recall from layoff status a supervisory employee solely because that employee is affiliated with a union. [citations omitted]." 61 L.R.R.M. at p. 2320.

The Ninth Circuit Court of Appeals reached the same conclusion in *National Labor Relations Board v. Fullerton Publishing Company*, 203 F.2d 545 (9th Cir. 1960). In that case the county news editor of a newspaper was deemed to be a supervisor. The Court then said:

> "The law is clear that a supervisor is not entitled to the protection afforded ordinary employees under the National Labor Relations Act, and as to supervisors there can be no such thing as a discriminatory discharge or unfair labor practice . . ."

Accord, *National Labor Relations Board v. Inter-City Advertising Co.*, 190 F.2d 420 (4th Cir., 1951), cert. den., 342 U.S. 908, 96 L.Ed. 679, 72 S.Ct. 301 (1952); *National Labor Relations Board v. Griggs Equipment, Inc.*, 307 F.2d 273 (5th Cir., 1962).

While all of the above cases affirm that the National Labor Relations Act does not protect supervisors, none of them develop the point here at issue—does a National Labor Relations policy pre-empt a state law which protects supervisors from discharge due solely to union membership? In *National Labor Relations Board v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, cert. denied, 335 U.S. 908, 69 S.Ct. 411 (6th Cir. 1948) it was stated:

> "The right of self-organization and of selection of a bargaining representative are rights which exist independently of either national or local labor relations acts. It was recognized and characterized as a fundamental right long before it was protected under the National Labor Relations Act and similar state acts . . . It was the regulation of this fundamental right of supervisory personnel formerly included within the Federal act that the 1947 amendatory provisions left to the states for separate classification and regulation." *Id.* at p. 577.

This position was quickly adopted by the State Courts throughout the country having occasion to deal with the subject. The California Court, in *Safeway Stores, Inc. v. Retail Clerks International Association*, 41 Cal. 2d. 567, 261 P.2d. 721, held the exclusion of supervisory employees and the regulation of their collective-bargaining rights from the National Labor Relations Act, as amended, left the field open completely to State control. The same conclusion is reached in *Martineau v. Director of Division of Employment Security*, 329 Mass. 44, 106 N.E. 2d. 420.

The case of *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327, 60 L.R.R.M.

2473 (1965) presents an excellent discussion of the doctrine of Federal pre-emption as it relates to supervisory personnel. In *Hanna*, the plaintiffs, employers, refused to negotiate with a union representing the Marine Engineers until it was established that the union represented a majority of the engineers. In response the union picketed the employer's ships. The plaintiffs petitioned the National Labor Relations Board requesting that a representation election be held, but the Board declined stating that the engineers were supervisors and therefore excluded from the definition of employees as defined by the Act (29 U.S.C. Section 152(2)). The employer filed an unfair labor practice charge against the union alleging a violation of Section 8 (29 U.S.C. Section 158) of the Act. The Board dismissed the charges on the ground that the union's conduct fell outside the provisions of the Act because it sought to represent "supervisors" rather than "employees". The employers next brought suit in the courts of the State of Wisconsin seeking injunctive relief, and their suit was dismissed for lack of jurisdiction over the subject matter. The Supreme Court of the State of Wisconsin affirmed its lower court decision asserting that the matter was governed by Federal law and within the exclusive jurisdiction of the National Labor Relations Board.

In reversing, the Supreme Court of the United States said:

> "The ground rules for pre-emption in Labor Law, emerging from our *Garmon* decision should first be briefly summarized: in general, a state may not regulate conduct arguably 'protected by Section 7, or prohibited by Section 8' of the National Labor Relations Act. See 359 U.S., at 244-246, and the Legislative purpose may further dictate that certain activity 'neither

> protected nor prohibited be deemed privileged against state regulation, cf. 359 U.S. at 245.
>
> For the reasons that follow, we believe the Board's decision that Hanna engineers are supervisors *removed from this case most of the opportunities for pre-emption.*" (emphasis supplied.) 382 U.S. at pp. 187-188.

The Court reasoned that exclusion of supervisors from the definition of employees had the obvious result that many provisions of the Act employing the term "employees" would cease to operate where supervisors were the focus of concern. There can be no protection by Section 157 nor prohibition by Section 158. It was argued by the union that Section 164(a) ousted both state and federal authority and signified a "laissez-faire" attitude toward supervisors. The Court found no merit in this argument since "the committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. Whether the Legislators fully realized that their method of achieving this result incidently freed supervisors' unions from certain limitations under the newly enacted Section 8(b) [29 U.S.C. Section 158(b)] is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing." 382 U.S. at pp. 189-190.

The crux of the *Hanna* decision is the doctrine of federal pre-emption enumerated by Mr. Justice Frankfurter, speaking for the majority of the Court, in *San Diego Unions v. Garmon,* 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959).

> "If the Board decides, subject to appropriate federal judicial review, that conduct is protected

> by Section 7 (29 U.S.C. Section 157) or prohibited by Section 8 (29 U.S.C. Section 158) then the matter is at an end, and the states are outsted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the states." 359 U.S. at p. 245.

The petitioners concede that nothing in the National Labor Relations Act protects supervisors from discharge for union membership. The petitioners do not agree, as the respondents might suggest, that supervisors are prohibited from union membership by the National Labor Relations Act or any National Labor relations policy. Section 14(a) (29 U.S.C. 164(a)) of the Act plainly states that nothing shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization. While the latter part of the section allows that no employer shall be compelled to deem individuals defined as supervisors employees for the purpose of collective-bargaining, the petitioners submit that under the stated facts and the North Carolina Right-To-Work Law they seek only to be deemed "persons" not "employees" and further they do not seek the right to collectively bargain with their employer but simply a remedy for their discharge.

II. BY ENACTMENT OF SECTION 14(b) OF THE LABOR MANAGEMENT RELATIONS ACT, CONGRESS CEDED TO THE STATES JURISDICTION OVER THE APPLICATION OF STATE RIGHT-TO-WORK LAWS.

When Congress amended the National Labor Relations Act in 1947 and gave birth to Section 14(a) of the Act

(29 U.S.C. Section 164(a)), which effectively excluded supervisors from its protection, Congress also enacted Section 14(b) quoted above. Section 14(b) specifically authorized the passage of state right-to-work laws which make unlawful a union or agency shop agreement which would otherwise be lawful by virtue of Section 8(a)(3) of the Act. (29 U.S.C. Section 158(a)(3)). Pursuant to this statutory authorization, the State of North Carolina enacted a right-to-work law which is contained in Article 10 of Chapter 95 of the General Statutes and became effective March 18, 1947. The general philosophy of this law as expressed by the North Carolina General Assembly in North Carolina General Statute 95-78 is as follows:

> "The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraint and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association. (1947, C. 328, S. 1)

North Carolina General Statute 95-81 provides that persons may maintain causes of action for damages against their employer for violation of the provisions of the right-to-work law.

> N.C.G.S. 95-83–"Any person who may be denied employment or be deprived of

> continuation of his employment in violation of Sections 95-80, 95-81 and 95-82 or of one of more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment."

The North Carolina Right-To-Work Law was upheld by the North Carolina Supreme Court in *State v. Whitaker,* 228 N.C. 352, 45 S.E.2d 860 (1947). Like or similar laws have been upheld by the United States Supreme Court. *Lincoln Fed. L. U. v. Northwestern I & M Co.,* 335 U.S. 525, 93 L.Ed. 212, 69 S.Ct. 251, 6 A.L.R.2d 473 (1949).

The application and enforcement of state right-to-work laws have been the subject of discussion in regard to their relationship to the doctrine of federal pre-emption in the field of labor relations. Section 14(b) of the National Labor Relations Act authorizing states to enact right-to-work laws has been interpreted as ceding to the states the power to enforce such laws without treading on pre-empted territory. *Higgins v. Cardinal Mfg. Co.,* 360 P.2d 456 (Kan. S.Ct. 1961) cert. den., 368 U.S. 829; *Algoma Plywood Co. v. Wis. Board,* 336 U.S. 301, 93 L.Ed. 691, 69 S.Ct. 584, 23 L.R.R.M. 2402 (1949); *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 84 S.Ct. 219, 11 L.Ed. 2d 179, 54 L.R.R.M. 2612 (1963).

In the *Schermerhorn* case (sometimes known as Schermerhorn II) the Court explained to some degree the significance of its decision in *Garmon, supra.*

> "Garmon does not state a constitutional principle; it merely rationalizes the problems

> of co-existence between federal and state regulatory schemes in the field of labor relations; and it did not present the problems posed by Section 14(b), *viz.*, whether the Congress had precluded state enforcement of select state laws adopted pursuant to its authority."

After concluding that states could properly enforce the provisions of their right-to-work laws the Court noted that "Congress . . . chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and application of agreements authorized by Section 14(b) and decided to suffer a medley of attitudes and philosophies on the subject."

Citing *Schermerhorn II* as their authority, a few courts have held that in suits brought by employees for wrongful discharge under an appropriate local right-to-work law the state court is the proper jurisdiction for the adjudication of the controversy. In *West v. Operating Engineers,* 70 C.C.H. LC Paragraph 13, 327, (U.S.D.C. S.D. Miss., 1972) a federal district court in a lengthy opinion declined to accept jurisdiction of such a cause of action and, on motion of the plaintiff, remanded the case back to the state court where it had begun. The Mississippi Right-To-Work Law reads much the same as the North Carolina Right-To-Work Law.

> Mississippi State Constitution Section 198A "It is hereby declared to be the public policy of Mississippi that the right of a person or persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. . ."

Quoting from Schermerhorn, the District Court stated:

> "In the light of the wording of Section 14(b) and this Legislative history, we conclude that Congress did not deprive the states of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements. Since it is plain that Congress left the states free to legislate in that field, we can only assume that it intended to leave unaffected the power to enforce those laws . . ."

In a case decided by the Supreme Court of Appeals of the State of Virginia, an employee who was discharged solely due to his non-membership in a union sought a remedy in the local courts of the State of Virginia based on Virginia's Right-To-Work Law, Article 3, Title 40.1 of the Code of Virginia, *Moore v. Local 10, Plumbers*, 179 S.E.2d 15, 76 L.R.R.M. 2391 (1971). The defendants raised the argument of federal pre-emption but the Virginia court citing *Schermerhorn II, supra*, held that the trial court had jurisdiction to entertain the action. The Court elaborated on the *Schermerhorn* decision to a degree by holding that the intention of the court in Schermerhorn would include oral as well as written union-security agreements.

Your petitioner concedes that the above cited cases are not on "all-fours" with the instant controversy. In all the reported cases an employee or group of employees have been deprived of their right to employment by a union-security agreement either written or oral in controvention of State law. The petitioner does not contend that a union-security agreement existed under the facts in the instant controversy. The petitioner submits, however, that right-to-work laws are two-edged swords. While no one doubts that their primary intention is to free persons from being coerced or forced into union membership as a condition of employment, right-to-work laws, as the North Carolina Statute in question, also provide to persons protection for

union membership. This is the basis of the status quo. One type of activity cannot be protected if not the other. Your petitioner submits that in view of the line of cases beginning with *Algoma Plywood Co.* and *Schermerhorn II*, the court has consistently held that the application and enforcement of local right-to-work laws is a proper subject for state jurisdiction and your petitioner requests that this cause of action be remanded to the Supreme Court of the State of North Carolina for its final determination.

Respectfully submitted,

/s/ LARRY L. EUBANKS,
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Douglas S. Punger

CERTIFICATE OF SERVICE

I, Larry L. Eubanks, hereby certify that on this day I served a copy of the foregoing PETITIONER'S BRIEF upon counsel of record for the Respondents by depositing copy thereof in the United States Mail in Winston-Salem, North Carolina, postage prepaid, and addressed as follows:

Mr. H. Gardner Hudson
610 Reynolds Building
Winston-Salem, North Carolina 27101

This the day of November, 1973.

/s/ LARRY L. EUBANKS
Larry L. Eubanks
Attorney for Petitioners